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In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 27825

WILLIAM PRESSER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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Now comes William Presser, petitioner, by and through his attorneys, and respectfully prays the Court that a Writ of Certiorari shall be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on July 6, 1961, affirming the judgment of conviction of petitioner.

OPINION BELOW.

The opinion of the Court of Appeals is set forth in the Appendix, *infra*, page 31, and is not yet officially reported.

The memorandum opinion of the District Court denying petitioner's motion for judgment of acquittal or for a new trial appears at page 326a of the Appendix below, nine extra copies of which are filed herewith. The memorandum opinion of the District Court has not been officially reported.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) to review the judgment of the Court of Appeals affirming the petitioner's conviction for violation of 18 U. S. C. § 1505.

On July 6, 1961, the Court of Appeals entered its judgment against petitioner. No petition for rehearing was filed on behalf of petitioner.

QUESTIONS PRESENTED.

I. Under an indictment for the violation of Title 18 U. S. C. § 1505, is the testimony of the Chairman of the Senate Select Committee on Improper Activities in the Labor or Management Field (hereinafter referred to as "Committee") admissible as evidence of (A) the question under inquiry by the Committee; (B) the pertinency or relevancy of the proper names listed on a paper and an invoice allegedly withheld or mutilated to the question under inquiry by the Committee; (C) knowledge on the part of the petitioner that the proper names allegedly listed on the paper and the invoice were pertinent or relevant to the question under inquiry by the Committee; and (D) the truth of the testimony of a Committee investigator which the Government contemplated and did subsequently introduce into evidence at the trial?

II. May an indictment and conviction for the violation of Title 18 U. S. C. § 1505 stand when the Government's evidence disclosed that the subpoena duces tecum requireing the production of documents, the violation of which subpoena is the foundation for the indictment, was not issued in accordance with the law, the rules of the Senate, the Senate resolution authorizing the establishment of the Committee, and the rules of procedure of the Committee?

III. May an indictment and conviction for the violation of Title 18 U. S. C. § 1505 stand for the alleged destruction of eight proper names on an invoice and withholding a sheet of paper with additional names when the subject under inquiry by the Committee and the pertinency or relevancy of the proper names to the Committee's investigation are not clear?

IV. Whether the Government's attorney's misstatement and misquotation of the evidence in his final argument to the jury deprived the petitioner of a fair and impartial trial?

V. Whether the evidence presented against the petitioner is sufficient to support a verdict of guilty?

STATUTES INVOLVED.

Title 28 U. S. C. § 1254(1).

§ 1254. Courts of appeals; certiorari; appeal, certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

* * * (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * * June 25, 1948, c. 646, 62 Stat. 928.

Title 18 U. S. C. § 1505.

§ 1505. Influencing or injuring witness before agencies and committees.

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the

United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or

Whoever injures any party or witness in his person or property on account of his attending or having attended such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein; or,

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 770.

Title 2 U. S. C. § 190b.

§ 190b. Authority of Senate standing committees and subcommittees; sitting while Senate or House in session.

(a) Each standing committee of the Senate, including any subcommittee of any such committee, is authorized to hold such hearings, to sit and act at such times and places during the sessions, recesses, and adjourned periods of the Senate, to require by subpena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, to take such testimony and to make such expenditures (not in excess of $10,000 for each committee during any Congress) as it deems available. Each such committee may make investi-

gations into any matter within its jurisdiction, may report such hearings as may be had by it, and may employ stenographic assistance at a cost not exceeding 25 cents per hundred words. The expenses of the committee shall be paid from the contingent fund of the Senate upon vouchers approved by the chairman.

(b) No standing committee of the Senate or the House, except the Committee on Rules of the House, shall sit, without special leave, while the Senate or the House, as the case may be, is in session. Aug. 2, 1946, c. 753, Title I, § 134(a), (c), 60 Stat. 831, 832.

STATEMENT OF THE CASE.

The circumstances which gave rise to the indictment of petitioner, as disclosed by the Government's case, show that Joint Council 41 is a component part of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter referred to as "Joint Council 41"), and is composed of affiliated local unions within its jurisdiction in the State of Ohio. Joint Council 41 is one of three such councils in the State of Ohio, and together they compose what is known as the "Ohio Conference of Teamsters" (196a, 221a, 222a).

On March 21, 1958, Joint Council 41 was served with a subpoena duces tecum, dated March 19, 1957 [sic 1958] (Government's Exhibit 9, 313a). This subpoena was served upon William Presser, the petitioner herein (85a, 89a), by Walter J. Sheridan, an investigator for the Senate Select Committee on Improper Activities in the Labor or Management Field (hereinafter referred to as "Committee") (56a).

The subpoena purported to require Joint Council 41 to produce forthwith before the Committee all of its records for the nine year period from January 1, 1949, to

January 1, 1958, including cash receipts, disbursement books, ledgers, cancelled checks, check stubs, day books, paid bills, records of loans, correspondence files, memoranda, pay roll records, minutes of meetings, records of all bank accounts, opened and closed, and any other records relating to Joint Council 41 (Government's Exhibit 9, 313a).

Following the service of the subpoena upon Joint Council 41, an arrangement was effected between Committee personnel in the Field Office at Cleveland, Ohio, and Mr. Cozza and Miss Steuer, accountants and attorneys for Joint Council 41, whereby the documents demanded by the subpoena were delivered to the Committee personnel in Cleveland (24a, 25a, 60a, 63a, 86a, 87a, 147a). When these documents were delivered to the Cleveland Field Office, Mr. Reibesell, a government accounting office employee on loan to the Committee and stationed at Cleveland, gave Mr. Cozza a receipt for the delivered documents and addressed any questions concerning those documents to Mr. Cozza (86a; 147a; Defendant's Exhibit B, 319a). This practice continued from shortly after the service of the subpoena upon Mr. Presser to August, 1958 (86a).

Mr. Sheridan knew of the practice established by the Field Office with Mr. Cozza and he also knew that the Field Office customarily receipted for the documents it received from Joint Council 41 (96a).

In late August of 1958, Walter J. Sheridan was informed by the Committee counsel that the Teamsters Union had established an "Anti-Corruption Commission" (61a). In view of the fact that ex-Senator Bender had been appointed to this commission, Mr. Sheridan was sent to Ohio by the Committee counsel to attempt to establish whether there had been an association between ex-Senator Bender and the Teamsters Union (62a). In pursuance of these in-

structions (62a), Walter Sheridan went to the office of Joint Council 41 on September 9, 1958.

On this date Mr. Sheridan talked to the petitioner and told him that he wanted to look through certain files (63a). Mr. Presser referred Mr. Sheridan to his secretary, and the files of several filing cabinets were made available to Mr. Sheridan (66a). Of the many files that Mr. Sheridan examined, he noticed in one of these files an envelope marked "Xmas List," and the envelope contained a voucher from the Rudolph Deutsch Company and a sheet of yellow paper with a list of names thereon (68a). Eight names appeared on the face of the voucher and these same names also appeared on the sheet of yellow paper along with some other names (68a). From all of the files examined by Mr. Sheridan, he made notes concerning only the voucher and the sheet of yellow paper (68a, 69a; Government's Exhibit 13; 317a). Mr. Sheridan's notes contained all of the details that were on the invoice and indicated that in addition to the names listed on the invoice other names were listed on the yellow sheet of paper (69a).

The cancelled check and check stub of Joint Council 41 showing payment of the Rudolph Deutsch invoice had been delivered to the Committee's Field Office prior to Sheridan's visit to the office of Joint Council 41 (59a, 94a, 137a, 138a, 146a; Defendant's Exhibit B, 319a; Defendant's Exhibit D, 323a).

When Mr. Sheridan was ready to depart the office of Joint Council 41 he stated to Mr. Presser that he would like to take four of the several files from the filing cabinet, one of which contained the invoice from the Rudolph Deutsch Company and the sheet of yellow paper (70a).

Mr. Sheridan testified that Mr. Presser did not want to allow the files to be taken from the office at that time because he wanted to have photostats made of them. To

this Mr. Sheridan agreed, and when he returned on September 13, 1958, to get the files they had not been photostated. Mr. Sheridan again examined the files and discovered that although the voucher was in the files the eight names that appeared thereon were torn off (Government's Exhibit 12, 316a) and the sheet of paper with the names thereon was missing (71a, 72a).

Mr. Presser testified upon this same matter that he was agreeable to permitting Mr. Sheridan to retain those files which Mr. Sheridan indicated he wanted. However, Mr. Presser felt that Mr. Sheridan should give a receipt for what he was taking from the office of Joint Council 41 (227a) in conformity with the practice established between Mr. Cozza and the Field Office (147a). Because of the late hour, Mr. Sheridan stated that he would be unable to give a receipt for all of the matters that he was taking, but either Mr. Sheridan or Mr. Presser suggested photostating the contents of the files, to which there was apparent agreement. When Mr. Sheridan returned on September 13, he found the files were not photostated and he again examined the contents. In a show of temper, Mr. Sheridan accused the petitioner or some teamster, of destroying a piece of paper, and in the same show of temper departed with the files without first giving any receipt to the defendant therefor (231a, 232a).

On March 23, 1960, the petitioner was indicted and charged with the violation of the provisions of Title 18 U. S. C. § 1505 (5a), to which indictment the petitioner entered his plea of not guilty on April 1, 1960 (1a). On May 31, 1960, the case was called for trial before Judge Paul Jones and a jury in the United States District Court for the Northern District of Ohio, at Cleveland.

During the course of the trial the petitioner took the stand in his own behalf and stated that he had no recollec-

tion of ever having seen the documents which are the subject of this suit prior to September 13, 1958, and denied that he withheld, erased or mutilated the documents which were the subject of this trial (232a). The petitioner had never been convicted of a crime (271a).

Emphasis has been supplied throughout this Petition by bold face type.

REASONS FOR GRANTING WRIT.

I. The testimony of the Committee Chairman was inadmissible against the petitioner and the admission of his testimony into evidence deprived petitioner of his right to a fair and impartial trial.

II. The petitioner could not have obstructed or impeded the due and proper exercise of the Committee's power of inquiry because the subpoena duces tecum, the alleged violation of which is the basis of petitioner's conviction, was not issued by the Committee.

III. The petitioner could not have obstructed or impeded the due and proper exercise of the Committee's power of inquiry because the Committee obtained the information it is claimed it sought without obstruction or impediment.

IV. The petitioner was deprived of his right to a fair and impartial trial by the misconduct of the Government's counsel in his final argument to the jury.

V. The evidence presented against the petitioner cannot sustain a conviction for the violation of 18 U. S. C. § 1505.

I.

The testimony of Senator McClellan was offered by the Government and was sought to be justified on the ground that such testimony was (334a-335a):

A. Evidence that the question under inquiry by the Committee was the due and proper exercise of the power of inquiry under which the Committee was conducting its investigation.

B. Evidence that the **proper names** allegedly listed on the sheet of paper and the Deutsch invoice were pertinent or relevant to the question under inquiry by the Committee.

C. Evidence that the petitioner had knowledge that the sheet of paper and the Deutsch invoice bore a reasonable relation to the subject matter of the Committee's inquiry and were relevant to it.

D. Evidence to corroborate the testimony of Walter J. Sheridan, whom the Government anticipated producing later in the trial.

The testimony of Senator McClellan cannot be justified for any purpose in the trial of this case. The real and substantial reason for producing McClellan was to attempt to construct a basis for the indictment of the petitioner, which did not exist in fact at the time of the indictment, and to vouch for the truth of the evidence the Government was to produce subsequently during the course of the trial.

A.

The petitioner conceives the law to be that in these matters wherein federal courts are called upon to adjust the interests of the Government with the rights and privileges of its citizens, the question of relevancy and pertinency is **twofold.**

First, the relevancy or pertinency of the subject under inquiry by the Committee must not exceed the scope of authority under which the particular investigation is being held. *Barenblatt v. United States*, 360 U. S. 109 (1959) and *Watkins v. United States*, 354 U. S. 178 (1957).

Second, the particular questions asked or the particular documents demanded must be relevant or pertinent to the subject under inquiry by the Committee. *Barenblatt v. United States, supra*, and *Watkins v. United States, supra*.

In *Watkins v. United States, supra*, at pages 206 and 214 the court unmistakably differentiated between the concept of relevancy or pertinency in the two instances above referred to.

The question of the relevancy or pertinency of the subject under inquiry by the Committee to the scope of authority under which the particular investigation is being held (referred to as jurisdictional pertinency in *Watkins v. United States, supra*) must be determined by the trial court as a matter of law, and the submission of this question, together with evidence thereof, to the jury is prejudicial error. Whether the subject under inquiry is within the scope of authority of the Committee (jurisdictional pertinency) must be determined by the court from the resolution establishing the Committee. If relevancy or pertinency cannot be established in this manner, the Government has failed to establish a vital element of the offense charged against the petitioner. *United States v. Rumely*, 345 U. S. 42 at 44 and 45 (1953).

The trial court at no point during the trial in the instant case made any determination that the subject under inquiry by the Committee was relevant or pertinent to the scope of authority of the Committee's investigating power. The trial court, on the other hand, admitted the testimony of Senator McClellan as evidence of such relevancy or pertinency and submitted the issue of jurisdictional pertinency to the jury for its determination as a matter of fact.

The testimony of Senator McClellan was wholly inadmissible to determine this issue and the court, in permitting the Senator to testify in any manner upon this subject, not only confused the issue in the minds of the jury, but deprived the petitioner of his right to have the "material and essential elements" necessary to constitute the offense determined as a matter of law.

B.

To support the charges made against the petitioner, it was incumbent upon the Government to prove that the **proper names** on the documents demanded, which documents were allegedly withheld or mutilated, were relevant or pertinent to the subject under inquiry by the Committee.

Again, the determination as to whether the **proper names** allegedly listed upon the documents demanded were relevant or pertinent to the subject under inquiry by the Committee must be determined by the trial court as a matter of law. *Barenblatt v. United States, supra; Watkins v. United States, supra; United States v. Rumely, supra* and *Sinclair v. United States,* 297 U. S. 263 (1929).

The trial court failed in any manner to make a determination as to whether the names listed upon the documents demanded were relevant or pertinent to the subject under inquiry by the Committee and permitted Senator McClellan, over the repeated objections of petitioner, to state that in his opinion the proper names on the demanded documents were relevant or pertinent to the Committee's inquiry. Upon this testimony from the Senator the trial court submitted the issue of the pertinency or relevancy of the proper names on the demanded documents to the subject under inquiry by the Committee to the jury for its determination as a matter of fact.

The Senator testified that if the sheet of paper and the Deutsch invoice in fact did contain proper names and those names were removed or withheld from the Committee, that fact alone would obstruct the investigation of the Committee because those names were pertinent to the Committee's inquiry (45a, 46a).

The petitioner contends that the question of "relevancy or pertinency" of the names on the demanded documents to the subject under inquiry by the Committee should have been determined by the court as a matter of law; and that, in failing to make this legal determination, the court abdicated its function in this respect in favor of Senator McClellan. However, the prejudicial effect of the court's error was compounded when, after determining that relevancy or pertinency was a matter of fact, the court permitted the Senator to usurp the function of the jury and testify as to the ultimate and conclusive fact which, in the trial court's view of the case, should have been submitted to the jury.

Not only was the introduction of any testimony by Senator McClellan incompetent to establish that the names on the demanded documents were relevant or pertinent into the subject under inquiry by the Committee, but the substance of the Senator's testimony was highly prejudicial to the petitioner for another reason. (45a, 46a.)

Going far beyond what could possibly be viewed as evidence of the relevancy or pertinency of the names allegedly listed on the demanded documents, the Senator was permitted to comment upon and read "special findings and legislative recommendations of the Committee" (26a), which were set forth in the Committee's Interim Report and introduced into evidence against the petitioner (Government's Exhibit 7, 27a).

After testifying to the legislative recommendations of the Committee, as set forth in the Interim Report, the Senator was permitted to read from and comment upon the Committee's "findings" with respect to "racketeers," "unsavory characters" and "criminals," some of whose names appeared on the Deutsch invoice (41a, 42a, 43a, 44a, 45a).

The trial court's duty in these matters is too well settled to warrant any doubt that the admission of the testimony of Senator McClellan was erroneous and prejudicial to the rights of the petitioner.

In *Sinclair v. United States*, 279 U. S. 263 (1929), the Court discussed pertinency and relevancy generally at page 299.

In keeping with the pronouncements of Mr. Justice Butler in *Sinclair v. United States*, Judge Edgerton stated in *Keeney v. United States*, 218 F. 2d 843 (D. C. Cir. 1954), at page 845, the principle petitioner believes is controlling in the instant case:

> **"Since pertinency did not concern the jury, the court erred in permitting the jury to hear testimony about the appellant's activities which bore only on pertinency and tended strongly to prejudice the jury."**

Concurring, Judge Danaher stated at page 846:

> **"I agree that the conviction should be reversed and a new trial be ordered. The error requiring this result stems from the failure to exclude the jury while highly prejudicial evidence was received to establish the element of pertinency."**

Concurring, Judge Prettyman stated at page 849:

> **"* * * Since the Supreme Court holds the issue is not for the jury, I agree that evidence which is not relevant to the issues before the jury and which is highly prejudicial to the accused on those issues, ought not be heard by the jury."**

United States v. Orman, 207 F. 2d 148 (3rd Cir. 1953) adheres to the same principle.

C.

One of the purposes for which the Government desired, and for which the court permitted, the introduction of the testimony of Senator McClellan was to prove **knowledge** on the part of the petitioner. Senator McClellan's testimony in this regard was to prove to the jury that the petitioner had **knowledge** of the question under inquiry by the Committee and that the petitioner had **knowledge** of the relevancy of the **names** on the Deutsch invoice and the paper to the question then under inquiry by the Committee.

That such was a purpose of the evidence from Senator McClellan is amply disclosed by the argument advanced by the Government to the jury (339a) and by the charge of the court (303a, 304a).

The Government was permitted to cross examine the petitioner at length concerning his knowledge of the findings contained in the Committee's Interim Report. The petitioner testified that he did not know of the Interim Report, had not read it and that it was only through the Government's case that he had "heard" that one of the persons listed in the Deutsch invoice was a "known consorter with criminals" (255a, 256a).

The petitioner testified also that any findings that the Committee had made concerning the Teamsters he read in the newspapers (255a).

The knowledge chargeable to the petitioner as set forth in the indictment is the knowledge attributable to him through the subpoena (Government's Exhibit 9, 314a) served on March 21, 1958 (Indictment, 5a). The

knowledge properly chargeable to the petitioner must stem from the Committee's due and proper exercise of its power of inquiry as it relates to the petitioner or Joint Council 41 for which he may be responsible.

In this regard it should be noted that the hearings which composed the Committee's Interim Report were heard, concluded and compiled prior to the date that Sheridan served his subpoena for Joint Council 41 records upon the petitioner. The Interim Report, as the Committee's final document, was filed with the Senate on March 24, 1958 (28a).

Rather than being evidence of the petitioner's **knowledge** of the question under inquiry by the Committee, the continued reference to and reading from the Committee's Interim Report during the trial and in final argument was a calculated effort to affect the jury in the manner which was recognized and condemned by the c[illegible]n *Bowers v. United States*, 202 F. 2d 447 at 452 (D C. Cir. 1953). The court in this case, considering the Int[illegible]m Report of another Congressional Investigating Committee, stated:

> "But whether so or not, it seems clear that pertinency was not shown here. One may be said to know another after a mere formal introduction or through the most casual acquaintance. Had it been shown, as it was not, that Johnston was engaged in some interstate criminal activity, whether Bowers had ever met him could not have pertained to the matter under investigation. **In a sense the subcommittee seems to have accused Bowers of guilt through casual acquaintance, which is even worse than guilt by association. Moreover, we note that Bowers said to the subcommittee with reference to Johnston, 'I don't know anything about him.'"**

D.

Senator John L. McClellan was called as the Government's first witness against the petitioner. Senator McClellan identified Government's Exhibit 8 as Volume 40 of the public hearings conducted by the Committee (34a), and Volume 40 was introduced into evidence over the objections of the petitioner (36a). Following the identification and introduction into evidence of Volume 40, Senator McClellan was permitted to read the testimony of Walter Sheridan given to the Committee on September 17, 1958 (38a, 39a, 40a, 41a).

At the time of trial five reasons were advanced by the Government to justify the Chairman's reading the testimony of a committee investigator. One reason given by the Government's attorney was:

> "* * * Before we get certain matters in evidence directly I would like the Senator to be able to testify as to their pertinency. * * *". (35a.)

Mr. Sheridan, who was in the corridor at the court while Senator McClellan testified, followed the Senator to the witness stand and testified concerning the facts which were allegedly the basis for his testimony before the Committee.

In view of the circumstantial nature of the case presented to the jury by the Government against the petitioner, the petitioner respectfully submits that the principle announced in *Mellon v. United States*, 170 F. 2d 583 (5th Cir. 1948) is controlling herein.

In reversing the trial court, the appellate court in the *Mellon* case stated at page 585 of its opinion:

> "* * * **we are forced to the conclusion that the admission of this evidence was prejudicial to Mellon, as tending to bolster the testimony of the witness Edgar, and doubly emphasize his evidence before the jury**

as against that of the accused. The general rule is that a witness may not be corroborated or have his sworn testimony reinforced by proof that on previous occasions he has made the same statement as those made in his testimony."

United States v. Alu, 246 F. 2d 29 (2nd Cir. 1957); *United States v. Keller*, 143 F. Supp. 692 (D. N. J. 1956) uphold the same principle announced in *Mellon v. United States, supra.*

II.

The Government's evidence disclosed that in the indictment and conviction of the petitioner for the violation of Title 18 U. S. C. § 1505 there has been not only a failure of any insistence upon procedural regularity, there has been a complete lack of such regularity.

Senate Resolution 74 established the Committee, and it provides in part (Government's Exhibit 5-C, 312a):

"* * * SEC. 2(a) **The select committee shall consist of 8 members * * *, and shall, * * * adopt rules of procedures not inconsistent with the rules of the Senate.** * * *

"SEC. 4. **For the purposes of this resolution the select committee is authorized as it may deem necessary and appropriate to * * * (4) require by subpena or otherwise the attendance of such witnesses and production of such correspondence, books, papers, and documents; * * *"**

Title 2 U. S. C., § 190 b (a) provides in part:

"Each standing **committee** of the Senate, including any subcommittee of any such committee, is authorized * * * to **require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents,** * * * as it **deems** advisable. * * *"

Paragraph 4 of the Rules of Procedure of the Senate Select Committee on Improper Activities in the Labor or Management Field (Government's Exhibit 6, 313a) provides:

> "Subpenas for attendance of witnesses and the production of memoranda, documents, and records **shall be issued by the Committee Chairman or by any other Member of the Committee designated by him in writing.**"

Senator McClellan testified that under the resolution establishing the Committee and the rules of the Committee itself, the Chairman had the authority to issue subpoenas (21a, 22a).

The Committee Investigator Walter J. Sheridan testified (84a):

> "Q. And your recollection is that it [subpoena] was prepared here? A. No, my recollection is that the chances are it was prepared here. I can't say for certain that it was.
>
> **Q. And the chances are that if it was prepared here you filled in a subpoena signed by Senator McClellan that was blank, isn't that correct? A. That would be correct."**

The practice of an investigator or other employee of the Committee deciding for whom a blank subpoena shall be directed and for what purpose or for what documents cannot be the "due and proper exercise of the power of inquiry under which the investigation is being had" by the Committee.

If any employee of the Committee can decide to whom a subpoena shall be directed and for what purpose or what documents, the Committee is **not** serving as the representatives of Congress in collecting information for a legislative purpose and the Committee's power of inquiry is not limited by the source of its existence.

Certainly those limitations upon the use of the compulsory process in furtherance of a legislative purpose advanced in *Watkins v. United States,* 354 U. S. 178 (1957) will have been totally ignored, if not openly flouted, if the conviction of the petitioner is permitted to stand. The Court of Appeals stated in its opinion: "* * * and we agree with the District Court that there was nothing unlawful in the method used by the Committee in issuing the subpoena duces tecum. Moreover, appellant knew that the documents in question were wanted by the Committee, and, in such a case the existence of a valid subpoena is not vital to the charge of obstruction of justice. * * *"

The view of the Court of Appeals cannot be reconciled with the statement of Chief Justice Warren in *Watkins v. United States, supra,* at page 215 of his opinion, wherein it is stated:

> "* * * **It is only those investigations that are conducted by use of compulsory process that give rise to a need to protect the rights of individuals against illegal encroachment.** That protection can be readily achieved **through procedures which prevent the separation of power from responsibility and which provide the constitutional requisites of fairness for witnesses.** A measure of added care on the part of the House and the Senate in authorizing the use of compulsory process and by their committees in exercising that power would suffice. That is a small price to pay if it serves to uphold the principles of limited, constitutional government without constricting the power of the Congress to inform itself."

There is no precedent in the entire history of legislation controlling the use of subpoena power by congressional investigating committees, and there is no justification in the light of the rights of the petitioner to be protected in this lawsuit, to warrant an inference that the Committee had a right to delegate indiscriminately its

subpoena power to an investigator or employee of the Committee.

The problems attendant upon the Committee's delegation of subpoena power to its employees were extensively considered by Mr. Justice Stone in *Cudahy Packing Co. v. Holland*, 315 U. S. 357 at 363 (1942):

> "Unlimited authority of an administrative officer to delegate the exercise of the subpoena power is not lightly to be inferred. **It is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer. * * * All these are cogent reasons for inferring an intention of Congress not to give unrestricted authority to delegate the subpoena power which it has in terms granted only to the responsible head of the agency.**"

Those inferior federal courts which have dealt with this question have had no difficulty in requiring Committees to exercise this subpoena power in compliance with the authority of their organization.

In *Ex parte Frankfeld*, 32 F. Supp. 915 at 916 (D. C., 1940), the matter was considered by Judge Letts as follows:

> "In this case the warrant had for its basis the affidavit of one Robert E. Stripling, who is described as the secretary of the Committee on un-American Activities. It seems obvious that Congress intended no such action to be taken by an individual. Stripling was not a member of the committee; he was an employee of the committee. It seems plain to me that he has no power to institute proceedings of this kind. I am likewise of definite opinion that a member of the committee would have no such right. Certainly a bystander could not institute proceedings of this kind. **Congress intended to place the responsibility upon the committee itself, and it has prescribed what proceed-**

ings may be had when the committee has reported to the Congress—The House or the Senate, as the case may be—the fact of a witness' refusal to answer."

In *Application of Barnes*, 116 F. Supp. 464 at 467 (N. D. N. Y., 1953), the District Court disposed of the matter as follows:

> "There is no judicial authority to my knowledge directly in point and the analysis of the intent of the Congress is made difficult by the immensity of the Act itself. The importance to the administration and enforcement of the Act is evident because it would ease the burden of investigations in such situations as here, **but such reason of expediency cannot prevail if the subpoena power exercised is in excess of the statutory grant.** The authority of Congress to delegate the subpoena power to administrative agencies is clearly established, even to the extent that it may delegate effective power to investigate violations of its own laws. However, the **subpoena power must remain within the bounds of the legislative grant, not overreach the authority granted by Congress, and in investigatory matters should be conferred in express and explicit terms for that purpose.** In my own judgment, subpoenas should not issue upon hit or miss legal grounds."

In *United States v. Olson*, 134 F. Supp. 481 at 482 (E. D. N. Y., 1955), the court stated:

> "**That which took place on August 23, 1951 was not a hearing before the Congressional Committee, no member of which was present, but consisted of inquiries made by investigators** in pursuit of their authorized calling. As pointed out in United States v. Brennan, 94 U. S. App. D. C. 184, 214 F. 2d 268, at page 271, certiorari denied 348 U. S. 830, 75 S. Ct. 53, the witness Olson could not have been dealt with as in contempt of the Committee, had he refused to answer the questions propounded by the investigators."

III.

That the proper names stated by Sheridan to have been listed on the sheet of paper allegedly withheld or the eight names on the Deutsch invoice allegedly mutilated were not pertinent or relevant to any question under inquiry by the Committee at the time they were allegedly mutilated and withheld was amply disclosed, albeit objectionable, by the testimony of Senator McClellan and that of Investigator Walter Sheridan.

The Government attempted to elicit from Senator McClellan the reason or purpose of Investigator Sheridan's visit to Ohio. The Senator testified that some investigation had been underway in Ohio and after George Bender had been appointed to a Teamster cleanup committee Sheridan "pursued some investigation of the situation by reason of the appointment of this committee" (32a, 33a, 34a).

Walter J. Sheridan testified that the Committee counsel in late August of 1958 had instructed him to go into Ohio and attempt to establish whether there was an association between George Bender and the Teamsters and the degree of that association. Sheridan came to Ohio in late August of 1958 and pursued those instructions (60a, 61a, 62a).

The development of the Government's case against the petitioner clearly indicated that Walter Sheridan did not come to Ohio to investigate Joint Council 41, but to determine George Bender's relationship with teamsters in Ohio. It is also clearly indicated that Walter Sheridan was sent by the Committee counsel to get **information**, and both he and Senator McClellan testified to this fact (45a, 101a). The testimony of both McClellan and Sheridan also disclosed that Sheridan did get the information for which he came to Ohio and that **information** was obtained by Sheridan on September 9, 1958.

Government's Exhibit 10 (315a) are the notes that Walter Sheridan made concerning his visit to the office of Joint Council 41 on September 9, 1958. Of the many files that were available to Mr. Sheridan, these were the only notes he made of any document or file (69a). The reason Mr. Sheridan gave for making those notes was that he was investigating George Bender (99a).

There are two factors which amplify the fact that Walter Sheridan, as an investigator, was interested in any information he might obtain concerning George Bender, rather than the fact that the documents purportedly required to be produced were the subject under inquiry by the Committee and that the proper names on those documents were pertinent or relevant to that inquiry.

First, the evidence produced by the Government over petitioner's objection of the retention of George Bender by the Ohio Conference of Teamsters in 1958 clearly verifies Sheridan's interest in George Bender. Second, the testimony of Sheridan as to his knowledge of the establishment of the field office in Cleveland for the local production of documents purportedly required to be produced by the subpoena (25a, 59a, 86a) indicates clearly that Sheridan was not aware what, if any, documents had not been produced by Joint Council 41.

The most conclusive proof that the proper names listed on the documents allegedly mutilated and withheld was the testimony of Senator McClellan.

During the course of the trial the Government's attorney questioned Senator McClellan about the specific "findings" of the Committee with respect to certain officers of the Teamsters Union whose names appeared upon the Deutsch invoice. After objection by the petitioner the trial court questioned Senator McClellan concerning the Committee's interest in one officer of the union sending

another officer of the union a Christmas gift. Senator McClellan stated to the court that it was not a question of one officer sending another officer a Christmas gift, but was a question of using union dues for such purposes (43a).

The Court of Appeals in the 4th paragraph of its opinion, Appendix, *infra*, pages 32-33, evaluates Senator McClellan's testimony in this regard as follows:

> "As Senator McClellan testified, the question was not whether an officer of the Union sent a champagne bucket to another officer, but 'it is a question of using Union dues money for such purpose'—and the use of Union dues money was one of the questions the Committee was investigating. * * * We accept this evidence as true on this appeal from a verdict and judgment in favor of the government."

If the testimony of Senator McClellan referred to above and quoted by the Court of Appeals is the true evidence on the petitioner's appeal, it should be abundantly clear that the petitioner did not and could not have obstructed or impeded the investigation of the question under inquiry by the Committee. Sheridan at all times had the Deutsch invoice which contained the information which Senator McClellan stated interested the Committee (72a; Government's Exhibit 12, 316a).

Sheridan had made notes of the proper names claimed to have been on the Deutsch invoice which Senator McClellan testified was not of interest to the Committee (43a).

The testimony of Sheridan and McClellan and the opinion of the Court of Appeals clearly indicate that the petitioner did not obstruct or impede the Committee in the due and proper exercise of its power of inquiry.

It is not discernible from the Government's evidence what subject the Committee had under inquiry on Septem-

ber 9, 1958, and under any view of the Government's evidence it cannot be said that the Appellant obstructed or impeded any due and proper exercise of investigative power by the **Committee.** To obstruct or to impede is to hinder or prevent progress toward a goal or an achievement. Sheridan had fulfilled the purpose for which the Committee counsel instructed him to travel to Ohio late August of 1958, and no act of the Appellant, or any other person, could have, at the time that Sheridan made the notes contained in Government's Exhibit 10, impeded or obstructed the achievement of Mr. Sheridan's goal.

The record of the events of the Committee with respect to the independent actions of Walter J. Sheridan fully disclose those factors that the Supreme Court found barren in the record of *Barenblatt v. United States*, 360 U. S. 109 at 134 (1959).

IV.

As the trial progressed, what had been characterized by the Government's attorney as a simple case became rather complex by the various attempts to justify the admission of evidence which, as the petitioner had contended, was erroneously admitted and prejudicial to the petitioner. During the Government's attorney's final argument repeated references were made to "criminals," "racketeers," "unsavory characters" and "persons of bad reputation."

With the repeated references to "criminals," "racketeers," "unsavory characters" and "persons of bad reputation" throughout the trial as a background, the misstatements of the evidence by the Government's trial attorney in his final argument had a telling effect upon the jury, the trial court and the Court of Appeals.

The Court of Appeals, in its opinion, Appendix, *infra*, page 34, has singled out the trial court's observation concerning the impact of the Government's proof of telephone calls from Hoffa in Washington to Presser in Cleveland, and the further proof of the petitioner seeking information "as to whether he could secure the duplicate invoices in question at a time when the original invoice had just been mutilated."

Regarding the telephone calls: The petitioner did not at any time attempt to establish a defensive alibi. The petitioner took the stand and candidly and honestly recounted the circumstances of Sheridan's visit to his office in September of 1958. He emphatically denied having consciously seen the documents in question at any time from 1955 until the time of trial, and denied that he mutilated either document or withheld them from Sheridan or the Committee (232a).

If the documents were subject to demand by Sheridan through the subpoena referred to in the indictment, Sheridan had those documents in his possession on September 9, 1958.

Regarding the duplicate invoices: Charles S. Schaeffer testified:

> "**I called and asked** for information as to **whether he** (Mr. Feder, Deutsch Company) **had any bills or invoices** which were sold to the Teamsters Union or to Mr. Presser **and, if so, I would like to have duplicate copies of them.**"

The Government argued to the jury that Mr. Schaeffer was perhaps the Government's most important witness because it disclosed that "Presser asked Schaeffer to attempt to get him the other copies pertaining to this gift" (341a, 342a). When petitioner's counsel called the misconduct of the Government's trial attorney to the atten-

tion of the trial court concerning this "most important witness of the Government," the trial court was so impressed with the Government's argument that he stated (327a):

> **"My impression of the cogent evidence which very likely influenced the jury was the defendant's testimony * * * To a like effect is the clear implication in Salesman Charles Schaeffer's testimony that the defendant, in September, 1958, was interested in securing the duplicate copy of the torn invoice. (Defendant's brief does not set out fully Schaeffer's testimony about trying to secure the duplicate invoice for Presser, see pages 381 and 382 of the typewritten transcript.)"**

If the trial court and the Court of Appeals were so impressed with the misstatements of the evidence by the Government's attorney in his final argument, certainly the influence the misstatements had upon the jury were equally as great as the trial court and the Court of Appeals have observed.

V.

To prove the charges made against the petitioner the Government relied upon circumstantial evidence (302a, 303a), and that evidence cannot support the conviction of guilty.

Following the service of the subpoena duces tecum demanding nine years of records of Joint Council 41 (Government's Exhibit 9, which the petitioner contends was a nullity), the demanded documents were turned over to an employee of the Committee at the Cleveland Field Office (86a). When these documents were turned over to the Committee's Field Office Paul T. Riebesell receipted for the documents (146a, 147a). However, several Government agencies or departments demanded the same documents over the same period of time (146a). Both Senator

McClellan (25a) and Walter Sheridan (86a) knew of this practice.

At the time Sheridan went to the office of Joint Council 41 on September 9, 1958 and on September 13, 1958, there was in the custody of the Committee's field office personnel the cash disbursement book of Joint Council 41 for 1955 (Government's Exhibit 23, 137a) and the cancelled checks with stubs of Joint Council 41 for November and December of 1955 (Government's Exhibit 24, 137a).

Line 7 of Government's Exhibit 23 under date of December 29, 1955, was the entry "A. R. Deutsch, $824." (175a) and a reference to check "82-8302" (175a).

Government's Exhibit 24 contained Check No. 8302 and the stub to that check had the notation "Rudolph Deutsch for $824 for Christmas gifts" (176a).

Despite the fact that Sheridan knew of the arrangement in existence between Joint Council 41 and Field Office (86a); knew that the Field Office gave receipts for documents it received (96a); and knew many receipts for Joint Council 41 were in the Field Office files (96a); Sheridan did not examine any of the documents in the Field Office. Particularly, Sheridan knew nothing about Government's Exhibits 23 and 24 "on or about and between September 9, 1958 and September 13, 1958" (94a).

Although Sheridan made notes (Government's Exhibit 10) of "all of the details" that appeared on the original of the Deutsch invoice (Government's Exhibit 9, 69a), he could not recall the appearance of "this second piece of paper" (68a).

Petitioner's secretary was called as a witness by the Government and testified that the petitioner was out of town following Sheridan's visit to the office of Joint Council 41 on September 9, and the date of the petitioner's absence was the "10th or 11th" (181a). Petitioner's secre-

tary also testified that in petitioner's absence from his office a great number of people had access to it for their business (165a).

If the petitioner is presumed innocent of the charges in the indictment and if the presumption remains with the petitioner until that presumption of innocence is overcome by **substantial** and **affirmative** evidence, the Government failed to exclude every other hypothesis except that of the guilt of the petitioner.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

EDWIN KNACHEL,
Counsel for Petitioner.

APPENDIX.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided July 6, 1961.)

Before SIMONS, Senior Circuit Judge, McALLISTER and CECIL, Circuit Judges.

McALLISTER, Circuit Judge. From a conviction on a charge of obstructing justice, in violation of a federal criminal statute, through mutilation and concealment of records sought by a congressional investigating committee, William Presser appeals. He claims the District Court committed error in admitting the testimony of Senator John L. McClellan as evidence of the question under inquiry by the Committee; the pertinency and relevancy of names on a paper and invoice allegedly withheld or mutilated; knowledge on Presser's part that such names were pertinent or relevant to the question under inquiry by the Committee; and the testimony of an investigator for the Committee. Appellant also contends that the subpoena duces tecum issued for the production of documents, the violation of which subpoena is the foundation for the indictment, was not issued in accordance with the law, the rules of the Senate, the rules of procedure of the Committee, and the Senate resolution authorizing the establishment of the Committee.

During the period in question, Presser was President of Joint Council No. 41 of the International Brotherhood of Teamsters. At that time, the Senate Select Committee on Improper Activities in the Labor or Management Field, was conducting an investigation, including the affairs of certain officers connected with the Teamsters Union. In carrying out its investigation, the Committee dispatched an investigator, Walter J. Sheridan, to Ohio, to examine

the books and records of certain organizations, including those affecting the relations between former Senator Bender and various officials of the Teamsters Union. Mr. Bender had previously been appointed by the provisional president, James R. Hoffa, as chairman of a committee to investigate the Union and the practices carried on by it.

Mr. Sheridan, the investigator for the Senate Committee came to Cleveland and served the subpoena upon Presser on March 21, 1958. Arrangements were made by the Committee and the Union whereby the subpoenaed records would be turned over to the office of the Committee in Cleveland rather than be taken to Washington. Sometime later, Sheridan, according to his testimony, returned to appellant's office on September 9, 1958, and asked for correspondence files that had not been previously given over in compliance with the subpoena; and, in going through the files, Sheridan found the envelope and invoice containing the list of names in question. The invoice showed a sale of eight champagne buckets at $100.00 each and contained eight names to whom the buckets were to be delivered, one of which was the name of former Senator Bender. It appeared that the buckets were to be Christmas gifts from the Union to the eight named persons.

As Senator McClellan testified, the question was not whether an officer of the Union sent a champagne bucket to another officer, but "it is a question of using Union dues money for such purposes"—and the use of Union dues money was one of the questions the Committee was investigating. Sheridan, after examining the documents, left them, including the invoice, in Presser's possession in order to permit the latter to photostat them; and, when, four days later, Sheridan returned, the envelope which bore the notation "Christmas list," and a sheet of paper which listed the names above mentioned were missing; and the

invoice itself had been torn in such a manner as to remove the eight names listed on it. When Sheridan realized that the envelope and sheet of paper containing the names had been removed from the files, and the invoice torn in such a way that the names were missing, he stated that he turned to Presser and said: "I should have known better than to trust you," and that Presser replied: "You have your job to do, I have mine." We accept this evidence as true on this appeal from a verdict and judgment in favor of the government.

However, with great awareness of the situation, Sheridan immediately sought out the original seller of the champagne buckets and was able to secure from him the duplicate copy of the invoice, which contained the eight names that had been torn off the original invoice.

On the trial, Presser maintained that he could not have done anything to the invoice because he went to Washington, D. C. the same day that Sheridan called at his office, and remained there until September 12, just before Sheridan returned to his office. Presser testified that during the time he was in Washington, he visited James R. Hoffa, and stayed in the suite of rooms maintained by the International Union of Teamsters, which is also used by Hoffa.

The government, however, proved that during the period Presser claimed he was staying in Washington and seeing Hoffa, Hoffa had been engaged in making two person-to-person calls to Presser, one to his home, and one to his office, both in Cleveland, one conversation lasting three minutes, and the other conversation lasting eighteen minutes. Moreover, in controverting Presser's claim that he had nothing to do with the removal of the "Christmas list" envelope, the paper containing the names of the persons to whom the Union was making gifts of champagne buckets, and the tearing from the invoice the names of the

persons to whom the champagne buckets were to be delivered, the government proved that, at this critical period, Presser was calling, by telephone, the salesman who had sold the champagne buckets three years before in an effort to secure the duplicate copy of the invoice that had been torn, which, it afterward appeared, the salesman was unable to get from the seller.

Here was the turning point of the case—the government's proof of the telephone calls from Hoffa in Washington to Presser in Cleveland, at the very time when Presser testified he was in Washington seeing Hoffa, and the further proof of the government of appellant's seeking information as to whether he could secure the duplicate invoice in question at a time when the original invoice had just been mutilated.

As Judge Paul Jones, the dean of federal judges, and the most experienced trial judge in the circuit, pointed out so fluently in his order denying a new trial: "Except for these circumstances, the jury may well have entertained a reasonable doubt as to defendant's guilt. But, no one that witnessed the event could have failed to sense the climatic effect of this evidence on the jury. It seemed to me that this evidence more than anything else influenced the jury's verdict."

We concur with Judge Jones in his opinion denying motion for judgment of acquittal or for a new trial, in the conclusion that the testimony of Senator McClellan was properly admissible in evidence; the trial court was correct in overruling objections based on various grounds to the testimony of Senator McClellan; and we agree with the District Court that there was nothing unlawful in the method used by the Committee in issuing the subpoena duces tecum. Moreover, appellant knew that the documents in question were wanted by the Committee, and, in

such a case the existence of a valid subpoena is not vital to the charge of obstruction of justice. A review of the record does not disclose that appellant was in any way deprived of a fair trial by reason of misstatement and misquotation of evidence by counsel for the government. The evidence presented was amply sufficient to sustain a verdict of guilty. Other claimed errors are not meritorious.

In accordance with the foregoing, the judgment of the District Court is affirmed.

JUDGMENT.

(July 6, 1961)

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

/s/ THOMAS F. MCALLISTER,
United States Circuit Judge.